Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1483

SUPERMARKETS GENERAL CORPORATION T/A
HOCHSCHILD KOHN DEPARTMENT STORE,
Appellant,

v.

STATE OF MARYLAND
Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court, moves that the decision of the Court of Appeals of Maryland be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

On 13 December, 1978, Appellant was charged with operating a retail business establishment on Sunday in violation of Article 27, Section 534N of the Annotated Code of Maryland. On 9 April, 1979 Appellant was convicted in the Circuit Court of Maryland for Anne Arundel County. A writ of certiorari was granted by the

Maryland Court of Appeals before argument and decision in the Maryland Court of Special Appeals. In an opinion filed 24 December, 1979, the Maryland Court of Appeals unanimously affirmed Appellant's conviction and found that the provisions of Article 27, Section 534N did not violate the United States Constitution. That opinion is reported at 286 Md. 611, 409 A.2d 250 and is reprinted in the appendix of Appellant's jurisdictional statement.

ARGUMENT

The Court of Appeals of Maryland was clearly correct in finding that the provisions of Article 27, Section 534N did not offend the United States Constitution. The decision was but one holding in a long line of Maryland cases affirming directly or indirectly the constitutionality of the State's Sunday closing laws.[1]

This Court considered the constitutionality of Maryland's Sunday closing laws in *McGowan v. Maryland*, 366 U.S. 420 (1961). In that decision this Court noted that the Sunday closing laws contained "a myriad of exceptions for various counties, districts of counties, cities and towns throughout the state", *Id.* at 424, and went on to hold that "the Fourteenth Amendment permits the State a wide scope of discretion in enacting laws which affect some

[1] *See Steimel v. Board of Education*, 278 Md. 1, 357 A.2d 386 (1976), *Dart Drug Corp. v. Hechinger Co.*, 272 Md. 15, 320 A.2d 266 (1974); *Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, 267 Md. 501, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973), *Rebe v. State's Attorney for Prince George's County*, 262 Md. 350, 277 A.2d 616 (1971); *Richards Furniture Corp. v. Anne Arundel County Board of County Commissioners*, 233 Md. 249, 196 A.2d 621 (1964); *McGowan v. State*, 220 Md. 117, 151 A.2d 156 (1959); *Ness v. Supervisors of Elections*, 162 Md. 529, 160 A. 8 (1932); *State v. Maryland Club*, 105 Md. 585, 66 A. 667 (1907); and *Atlantic Department Stores v. State's Attorney for Prince George's County*, 22 Md. App. 381, 323 A.2d 617 (1974).

groups of citizens differently than others", *Id.* at 425. This Court further explained its decision by saying that:

> . . .We have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion, we find no invidious discrimination here; *citing Salsburg v. Maryland*, 346 U.S. 545 (1954).

Id. at 427.

In an oft-cited concurring opinion on the history and purposes of Sunday blue laws, Justice Frankfurter took note of cases "sustaining state statutes applicable in some, but not all, localities . . ." 366 U.S. at 532 N. 135, and stated:

> Many of the jurisdictions which have Sunday laws provide some form of local option procedure for the creation of exceptions. This is only to recognize the obvious fact that conditions of limited geographical range may be determinative in striking the balance of forbidden and permissible Sunday activity which best accords with popular habits and desires. In Maryland the State Legislature itself does the job of adapting the general state-wide law to the local circumstances. This difference in method can scarcely entail different federal constitutional consequences.

Id. at 537 N. 138.

Since that decision, this Court has consistently summarily affirmed decision upholding Sunday closing laws, or dismissed appeals of such decisions or denied certiorari.[2]

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[2] *See, e.g., Giant of Maryland, Inc. v. State's Attorney for Prince George's County*, 267 Md. 501, 298 A.2d 427, *appeal dismissed*, 412 U.S. 915 (1973); *Spartan's Industries, Inc v. State*, 447 S.W.2d 407 (Tex.), *appeal dismissed*, 397 U.S. 590 (1970); *Sundaco, Inc. v. State*, 445 S.W.2d 606 (Tex.), *appeal dismissed*, 397 U.S. 591 (1970); *Zayre of Georgia, Inc. v. City of Marietta*, 416

Appellant claims that since the Maryland statutory scheme provides for different Sunday closing laws for different counties the precepts of the United States Constitution are violated. This Court has long held that there need not be uniformity of law as between political subdivisions.

McGowan v. Maryland, 366 U.S. 420 (1961) upheld a statute permitting Sunday sales of certain items in Anne Arundel County but prohibiting such sales elsewhere. This Court wrote:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, there laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-426.

In *McGowan v. Maryland, supra*, this Court also clearly stated "we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite",[3] 366 U.S. at 427. This Court

F.2d 251 (5th Cir. 1969), *cert. denied*, 397 U.S. 918 (1970); *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406 (D.S.C.), *aff'd*, 393 U.S. 9 (1968); *Solomon v. South Carolina*, 245 S.C. 550, 141 S.E.2d 818, *appeal dismissed*, 382 U.S. 204 (1965).

[3] There is some authority that equal protection principles simply do not apply if classifications are based on geographical factors, *Hogan v. Rosenberg*, 24 N.Y.2d 207, 299 N.Y.S.2d 424, 247 N.E.2d 260 (1969), *rev'd on other grounds sub. nom. Baldwin v. New York*, 399 U.S. 66 (1970), *Mathis v. North Carolina*, 266 F. Supp. 841 (M.D.N.C. 1967). *See also Muzquiz v. City of San Antonio*, 378 F. Supp. 949 (W.D. Tex. 1974).

referred to *Salsburg v. Maryland, supra*, in which it had stated that "The Equal Protection Clause relates to equality between persons as such rather than between areas" "was established long ago" in *Missouri v. Lewis*, 101 U.S. 22 (1880), 346 U.S. at 551. In upholding a statute providing for a state appellate court system that differed between counties, this Court had said in *Missouri v. Lewis*:

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution, of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. * * * It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

101 U.S. at 31. *See also Hayes v. Missouri*, 120 U.S. 68 (1887), rejecting an equal protection attack on a state statute providing for a different number of peremptory challenges in capital cases depending on the location of the trial.

Prior to *McGowan* this Court had considered an analogous Maryland statutory scheme in *Salsburg v. Maryland*, 346 U.S. 545 (1954). That decision concerned a statute permitting illegally seized evidence to be used in gambling misdemeanor prosecutions in Anne Arundel County.[4] Similar evidence could not be used elsewhere in the State.

[4] At that time the exclusionary rule was not yet applicable to the states and hence each state could determine its own rules with respect to illegally acquired evidence. Such a statute could not now stand in light of *Mapp v. Ohio*, 367 U.S. 643 (1961).

The Court quoted *Missouri v. Lewis* extensively and found that the law did not violate the equal protection clause. It noted that:

> There seems to be no doubt that Maryland could validly grant home rule to each of its 23 counties and to the City of Baltimore to determine this rule of evidence by local option. It is equally clear, although less usual, that a state legislature may itself determine such an issue for each of its local subdivisions, having in mind the needs and desires of each. Territorial uniformity is not a constitutional requisite. *Ocampo v. United States*, 234 U.S. 91, 98-99.

346 U.S. at 552.

More recently in *Griffin v. School Board of Prince Edward County*, 372 U.S. 218 (1964), this Court noted again that "[A] State, of course, has wide discretion in deciding whether laws shall operate statewide or shall operate only in certain counties, the legislature 'having in mind the needs and desires of each.'" 377 U.S. at 231.

In determining whether the State's Sunday closing laws had a rational basis, the Maryland Court of Appeals held that the changes in the statutory scheme allowing for different laws applicable in different counties did not render the statute(s) unconstitutional. The Court of Appeals wrote:

> . . . we conclude that the amendments since *McGowan* do not destroy their rational basis so as to render them essentially arbitrary. The evidence here adduced, such as demographic studies, the Maryland Statistical Abstract of 1977 and affidavits of various persons, for example, from residents of Baltimore County, that they shopped on Sunday in counties where stores were open and that they would have shopped in Baltimore County stores on Sunday had they been open, does not persuade us that the statutes now lack a rational basis. The short of it is that as we read *McGowan* the purpose of providing a day on

> which there shall be a lesser degree of business activity is a valid reason for Sunday closing laws, and the fact that persons in different areas of the State have different desires and needs with respect to the extent of business activity in their areas does not create unreasonable classifications. Consequently, the desire of populace of a few counties to have no reduction in commercial activity on Sunday whatsoever, does not, under the principles of *McGowan*, require any different result.

286 Md. at 623-624, 409 A.2d at 257.

In essence, the words of Justice Frankfurter in *McGowan* nearly two decades ago point up the defect in Appellant's case and the justification for the Maryland statutes:

> There is presented in this record not a trace of evidence as to the habits and customs of the population of Maryland or of Anne Arundel County, nothing that suggests that the pattern of legislation which their representatives have devised is not reasonably related to local circumstances determining their ways of life. Appellants have wholly failed to meet their burden of proof.

366 U.S. at 536-37.[5]

This Court has consistently ejected appeals and petitions urging it to review Sunday closing laws in various cases.[6] Although three State courts have invalidated their own state Sunday closing laws, they did so on a basis not

[5] There was some evidence of the habits of the residents of Baltimore County introduced during the trial of one of Appellant's co-appellants in the Maryland Court of Appeals. There was, however, no evidence of the habits of the people of Anne Arundel County.

[6] See footnote 2, *supra*.

present in this case.[7] The overwhelming majority of state courts have upheld the constitutionality of Sunday closing laws.[8]

This Court has written that "[w]hen local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory distinctions", *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This is because

> States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinction may be made with substantially less than mathematical exactitude . . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

427 U.S. at 303-04. It has further noted that it is by now absolutely clear that the Due Process Clause does not empower the judiciary "to sit as a superlegislature to weigh the wisdom of legislation, *Ferguson v. Skrupa*, 372

[7] *Caldor's, Inc. v. Bedding Barn, Inc.*, 40 Conn. L. J. 41, 47 U.S.L.W. 2669 (Conn. 10 April, 1979), *Kroger Co. v. O'Hara Township*, 481 Pa. 101, 392 A.2d 266 (1978), and *People v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574 (1976) all concerned differences in commodities available for sale not territorial distinctions.

[8] *See, e.g., Vornado, Inc. v. Hyland*, 77 N.J. 347, 390 A.2d 606 (1978); *Malibu Auto Parts v. Commonwealth*, 218 Va. 453, 237 S.E.2d 782 (1977); *Zayre Corp. v. Attorney General*, 372 Mass. 423, 362 N.E.2d 878 (1977); *Gibson Products Company, Inc. v. State*, 545 S.W.2d 128 (Tex. 1976), *cert. denied*, 431 U.S. 955 (1976); *Genesco, Inc. v. J.C. Penney Co., Inc.*, 313 So.2d 20 (Miss. 1975); *Caiola v. City of Birmingham*, 288 Ala. 486, 262 So.2d 602 (1972); *Brown Enterprises, Inc. v. Fulton*, 192 N.W.2d 773 (Iowa 1972); *State v. Giant of St. Alban's, Inc.*, 128 Vt. 539, 268 A.2d 739 (1970); and *City of Bismarck v. Materi*, 177 N.W.2d 530 (N.D. 1970). *Vornado, Malibu Auto Parts, Caiola*, and *Materi* all involve some form of territorial distinction as to the applicability of Sunday closing laws.

U.S. 726, 731," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

As there is a rational basis for providing different laws for different geographical areas of Maryland, the Maryland Court of Appeals properly found the Sunday closing laws constitutional and correctly suggested that if the laws were to be modified, the General Assembly of Maryland had the power and the means to do so.[9]

Appellee respectfully submits that this appeal does not present a substantial question and requests that the decision of the Maryland Court of Appeals be affirmed.

Respectfully submitted,

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[9] The General Assembly has already done so. During the 1980 legislative session, the General Assembly enacted legislation that established a generally uniform Sunday closing law that would apply to Anne Arundel County, Howard County, Baltimore County and Baltimore City. A key feature of this legislation was the provision that "suspended" its operation on the four Sundays preceding Christmas. The Governor of Maryland signed this legislation on 27 May, 1980.